Filed 2/27/15 In re S.H. CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re S. H., a Person Coming Under the Juvenile Court Law.	
NAPA COUNTY HEALTH & HUMAN SERVICES, Plaintiff and Respondent, v. A.H. et al., Defendants and Appellants.	A142273 (Napa County Super. Ct. No. JV17642)

Appellants Aaron H. (Father) and Shawnee A. (Mother) (jointly, Parents) appeal from the juvenile court's jurisdictional and dispositional orders relating to their son, S. H. (Minor). We conclude the court's finding of jurisdiction over Minor under section 300, subdivision (b) of the Welfare and Institutions Code (section 300(b))[1] was not supported by substantial evidence.

PROCEDURAL BACKGROUND

On January 28, 2014, the Napa County Health and Human Services Agency (Agency) filed a juvenile dependency petition (Petition) alleging that Minor, age 11 months, was within the juvenile court's jurisdiction under section 300(b). The Petition followed the January 24 arrest of Parents for child endangerment. The petition alleged

[1] All further undesignated statutory references are to the Welfare and Institutions Code.

there was a substantial risk Minor would suffer serious physical harm or illness (§ 300(b)) based on eight allegations. The allegations related to an incident during which police officers found Parents arguing inside their home while Minor was alone in a car outside; the home was messy and smelled of marijuana, and marijuana products were left on open surfaces in the living room.

Minor was placed in foster care and ordered detained by the juvenile court on January 29, 2014. On February 5, the Agency returned Minor to his parents for an "extended visit," and the court ordered Minor returned to the custody of Parents on February 13.

The juvenile court conducted a jurisdictional hearing over several days in February and March 2014. On the Agency's motion, the juvenile court struck an allegation of substance abuse from the Petition. At the end of the hearing on March 26, the juvenile court found it had jurisdiction over Minor under section 300(b). Although the court mentioned only some of the allegations in its oral ruling, the court's written order found all eight jurisdictional allegations were true.

On June 19, 2014, the juvenile court entered its dispositional order, largely adopting the recommendations of the Agency.[2]

Parents appealed from the jurisdictional and dispositional orders.

[2] Because we conclude insufficient evidence supported the juvenile court's jurisdictional findings, we need not and do not detail the court's dispositional order and related factual background. We do note the Agency's dispositional reports did not allege evidence of recurrence of any of the circumstances that led to the Petition.

FACTUAL BACKGROUND[3]

On January 24, 2014, officers Tom Helfrich and Ken Chapman responded to a police dispatch regarding an argument taking place at a house in Napa County. When the officers arrived, they saw a car parked on the street in front of the house and heard a male and female arguing inside. The woman was making statements such as " 'Leave me alone,' " and the man was making statements such as " 'Please go to work.' " Upon entering the home, the officers saw Father standing at one end of the living room outside the bathroom door; Mother was in the bathroom with the door shut. Mother said Parents were arguing about her going to work and about changing Minor's diaper. Mother said no "hitting, pushing, or shoving" had taken place.

The house was "filthy," and there was a "heavy odor of marijuana." There were closed prescription medicine bottles and a packet labeled as medical marijuana on a table in the living room. On a computer table in the living room, there were more packets of "hermetically sealed" medical marijuana, several burnt joints, marijuana particles, a marijuana pipe, and at least one plastic container of what appeared to be "hash oil." There was a crib "in the middle of the living room." A joint with marijuana "particles" was found on the floor in Parents' bedroom, as well as a marijuana pipe on a dresser. Officer Helfrich testified there were no other dangerous situations present in the home, other than the marijuana. Officer Chapman testified he was concerned by the "general status" of the home, and a toddler "being able to get into things or have things fall on them."

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[3] The Agency's brief on appeal does not adequately comply with Rule 8.204(a)(1)(C) of the California Rules of Court, which obligated the Agency to "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (See *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 745.) The Agency's failure to do so has resulted in a waste of judicial resources, as this court was obligated to search through the record to determine whether various factual assertions by the Agency were actually supported by evidence in the record.

The Agency's social worker testified Minor could crawl but not walk unassisted, and she had observed him reaching. She opined he was physically able to touch the top of Parents' computer desk if he reached.

Father told the officers Minor was in the car outside. Officer Helfrich discovered Minor restrained in a car seat in the back seat of the car. The windows were partially down. The keys were in the ignition, but the car was not running. Minor was "very content" and "didn't appear to be in any distress or harmed at all." Mother estimated she had been arguing with Father for about 20 minutes, but the officers did not know how long Minor had been in the car. The car was in front of the house and the front door was open. Officer Helfrich testified Father had his back turned and was not watching what was happening outside. Officer Chapman testified Father could not see the car because he was in a hallway just off the living room. It was about 50 feet from the bathroom to the car.

The officers arrested Parents for child endangerment. Mother's mother (Grandmother) arrived at the residence to take care of Minor. However, a child protective services worker subsequently arrived and took Minor instead. The worker stated in a report that both of the maternal grandparents "failed to pass the CLETS process which prevented [Minor] from being placed immediately with either of them."

The Agency worker who detained Minor stated in her report that there was adequate food in the house on January 24, 2014. The Agency's jurisdiction report stated that Minor "appeared well cared for and was developmentally on track." He "did not have any signs of abuse or neglect and his body was free from marks or rashes of any kind." Grandmother told the Agency she had never seen the house as messy as it was on January 24 and Minor was "well cared for." Mother told the Agency that Minor was always closely supervised in the home and Parents only consumed marijuana outside Minor's presence when Minor was asleep in his bedroom. Mother told the Agency she was breastfeeding, but she said it was her understanding the active chemical in marijuana

did not pass through to her breast milk. She said the home was in the state it was because she had stopped cleaning after being sexually assaulted a few days before January 24.

The Agency social worker supervised a visit between Minor and Parents on January 31, 2014, "and found the interaction to be loving and nurturing." She visited Parents' home on February 4, "and found the home to be clean and containing no safety hazards or concerns." She observed another "appropriate and nurturing" visit between Parents and Minor on February 5, and that same day she visited Parents' home and found it to be "clean and appropriate with no safety concerns." On February 5, Parents agreed to and signed a "safety plan" providing that Mother would not breast feed Minor while using marijuana; Parents would keep any marijuana and drug paraphernalia in a locked location; Parents would directly supervise Minor or provide for his care in their absence; Parents would not consume marijuana indoors; Parents would not simultaneously consume marijuana while caring for Minor; and a social worker could conduct twice monthly unannounced home visits. Minor was returned to Parents' care the same day.

At the jurisdictional hearing, Officer Kenneth Stevenson, an employee of the Napa County Probation Department, testified as an expert witness regarding the impact of marijuana on children. He testified that, based on his training and reading, children could suffer various serious physical harms from ingesting a marijuana "bud" or "hash oil," which is a more concentrated form of marijuana. He testified the remnant of a joint could cause "harm," although he did not specify the nature or degree of harm. He also testified the active ingredient in marijuana (THC[4]) could be transferred to persons inhaling secondhand smoke and that it passes into breast milk.

[4] "THC" stands for tetrahydrocannabinol. (Merriam-Webster's 11th New Collegiate Dict. (2003) p. 1294.)

Parents presented testimony from a medical doctor, Jeffrey Hergenrather.[5] He opined that second hand marijuana smoke would not present a serious risk of harm to a child because THC dilutes "very rapidly" and absorption of the chemicals in marijuana smoke would be "insignificant;" second hand tobacco smoke presents a greater risk of harm. He also opined breast feeding would not pass the active ingredients in marijuana to an infant if an hour was left between consumption and nursing, due to the rapid metabolism of those ingredients. Neither would the consumption of remnants of marijuana present a health risk to an infant. Finally, Dr. Hergenrather explained that CBD (cannabidiol) is a non-psychoactive cannabinoid that has medical benefits without producing a high and that some cannabis oils are mostly CBD.

Father testified at the jurisdictional hearing, stating that he and Mother were arguing for about 20 minutes before police arrived on January 24, 2014. The underlying cause of the argument was the stress Mother was under because she was returning to work after being sexually assaulted days before. The argument related to whose turn it was to change Minor's diaper; after Mother changed the diaper, Father took him to the car and then reentered the house to get Mother to come out to the car to go to work. Father could see Minor from where he was inside the house, and Minor was only in the car for 30 to 45 seconds before the police arrived. Father testified he would never leave Minor alone in a car again, "not even a moment."

Father testified Minor was never allowed to roam the house unsupervised. In the future, Parents planned to keep any marijuana in a locked cabinet. Father further testified he did not smoke marijuana in front of Minor or while caring for Minor. He explained

[5] Parents also filed a declaration from a person named Chris Conrad, who had qualified as a cannabis expert in many prior cases. He opined Parents' behavior posed "no danger" to Minor based on various specific properties of marijuana. The Agency argues Parents may not rely upon the declaration because it was not admitted into evidence; Father disagrees. Because the declaration is unnecessary to our decision, we need not and do not decide whether the declaration was evidence properly before the juvenile court.

the oil in the home was CBD purchased at a dispensary, and labeled as such. It "was intended to be able to alleviate some of [his] pain without rendering [him] under a narcotic effect." Father had not smoked marijuana the morning of January 24, 2014, he had not smoked since then, and he had been testing clean twice a week for the probation department in relation to the pending criminal case.

Mother testified she had never smoked marijuana in the same room as Minor. She usually smoked marijuana after putting Minor down for a nap or to bed at night. She smoked marijuana the night before Minor was detained, but not that morning. Parents' home was not usually messy like it was on January 24, 2014; it was messy because she had been sexually assaulted three days before. She agreed it was too messy for a home with a child Minor's age. She was stressed on January 24, 2014 because she was returning to work for the first time after the sexual assault. Parents argued about whose turn it was to change Minor's diaper. Mother changed the diaper, Father took Minor to the car, and then Father came back inside to get Mother to leave the house. That is when the police arrived.

Mother testified she could not breast feed Minor anymore because she had stopped lactating following his detention; she did not intend to try to reestablish breastfeeding and did not believe she could do so. She had not used marijuana since January 24, 2014. Although they did not have any marijuana in the home currently, Parents had purchased a lock box to store any marijuana they possess in the future. Mother believed the safety plan Parents agreed to was reasonable, including not smoking marijuana in the home, and she intended to follow the plan "for the rest of [her] life." Finally, she testified there had never been any domestic violence between Parents, in Minor's presence or otherwise.

DISCUSSION

Parents contend there was no substantial evidence to support the juvenile court's jurisdictional findings under section 300(b). We agree.[6]

I. *Legal Background*

" ' "A dependency proceeding under section 300 is essentially a bifurcated proceeding." [Citation.] First, the court must determine whether the minor is within any of the descriptions set out in section 300 and therefore subject to its jurisdiction.' [Citation.] ' "The petitioner in a dependency proceeding must prove by a preponderance of the evidence that the child who is the subject of a petition comes under the juvenile court's jurisdiction." ' [Citation.] 'The basic question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm.' " (*In re A.S.* (2011) 202 Cal.App.4th 237, 243–244.)

The substantial evidence standard of review applies. (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022.) We review the entire record to determine whether substantial evidence supports the juvenile court's findings, resolving all conflicts and drawing all reasonable inferences in support of the findings. (*Ibid.*) Those inferences "must be reasonable and logical; 'inferences that are the result of mere speculation or conjecture cannot support a finding.' " (*In re B.T.* (2011) 193 Cal.App.4th 685, 691.) "We do not reweigh the evidence, evaluate the credibility of witnesses or resolve evidentiary conflicts. The appellant has the burden to demonstrate there is no evidence of a sufficiently substantial nature to support the findings or orders." (*In re Jordan R.* (2012) 205 Cal.App.4th 111, 135–136.)

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[6] Because we conclude insufficient evidence supported jurisdiction under section 300(b), we need not and do not address any of Parents' other contentions related to the jurisdictional findings, including that the juvenile court failed to specify the allegation or allegations on which it was basing jurisdiction, erred in considering matters outside the record, and abused its discretion in declaring Minor a dependent of the court. We also need not and do not address any of Parents' challenges to the juvenile court's dispositional order.

"Substantial evidence does not mean *any* evidence; it must be ' " 'substantial' proof of the essentials which the law requires." ' [Citations.] 'To be sufficient to sustain a juvenile dependency petition[,] the evidence must be " 'reasonable, credible, and of solid value' " such that the court reasonably could find the child to be a dependent of the court . . . .' [Citation.] A mere 'scintilla' of evidence is not enough." (*In re B.T., supra,* 193 Cal.App.4th at p. 691.)

Here, the juvenile court assumed jurisdiction under section 300(b).[7] " 'Before courts and agencies can exert jurisdiction under section 300[(b)], there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness,' " as a result of the parent's failure or inability to adequately supervise or protect the child. (*In re A.S., supra,* 202 Cal.App.4th at p. 244; See also § 300(b).) "This language was introduced into section 300 as part of the wholesale revision of that statute in 1987. (1987 Stats., ch. 1485, § 4, p. 5603.)" (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) "The Legislature's unmistakable intention in doing so was to narrow the grounds on which children may be subjected to juvenile court jurisdiction." (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1379; see also *In re Rocco M.,* at pp. 820–824.)

"The three elements for jurisdiction under section 300[(b)] are: ' "(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) 'serious physical harm or illness' to the [child], or a 'substantial risk' of such harm or illness." ' [Citations.] 'The third element, however, effectively requires a showing that *at the time of the jurisdictional hearing* the child is at substantial risk of serious physical harm in the

[7] Section 300(b) provides in pertinent part that a child may be adjudged a dependent child of the court where "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child. . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse. . . . The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness."

future (e.g., evidence showing a substantial risk that past physical harm will reoccur).' " (*In re B.T.*, *supra*, 193 Cal.App.4th at p. 692; see also *In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 824 ["While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm."].) "[P]revious acts of neglect, standing alone, do not establish a substantial risk of harm; there must be some reason beyond mere speculation to believe they will reoccur." (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 565.)

II. *No Substantial Evidence Supported Jurisdiction Under Section 300(b)*

At the outset, we note the Agency does not contend Parents' possession or use of marijuana and hash oil in January 2014 was outside the scope of the Compassionate Use Act. Under the Compassionate Use Act of 1996 (Health & Saf. Code, § 11362.5), California laws prohibiting the possession and cultivation of marijuana "no longer apply to a patient or his primary caregiver who possesses or cultivates marijuana for the patient's medical purposes upon the recommendation or approval of a physician." (*United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 486.) As the juvenile court acknowledged, an Attorney General opinion concluded that "[c]oncentrated cannabis or hashish is included within the meaning of 'marijuana' as that term is used in the Compassionate Use Act of 1996." (86 Ops.Cal.Atty.Gen. 180 (2003).) That conclusion was recently adopted by our colleagues in the Third District in *People v. Mulcrevy* (2014) 233 Cal.App.4th 127. The record shows both parents had physicians' recommendations to use marijuana, and the Agency's social worker testified she verified Parents' cards were registered with Napa County. Accordingly, the relevant jurisdictional issue in the present case is whether Parents' *manner* of possession and use of marijuana presented a substantial risk of serious physical harm to Minor at the time of the jurisdiction hearing, without any suggestion that jurisdiction may be based on Parents' possession and consumption of marijuana in itself.

We now proceed to consider the Agency's allegations and supporting evidence in turn.

A. *Allegation b-1*

Allegation b-1 provides, "On 1/24/14 [Mother] and [Father] were arrested for child endangerment and failed to leave provision for care for 11-month-old son [Minor]." The bare fact that Parents were arrested based on the January 2014 incident is not evidence of the requisite risk harm; in fact, the criminal case against Parents was dismissed prior to trial.[8] The juvenile court was obligated to determine itself whether the Agency had demonstrated a substantial risk of serious physical harm to Minor at the time of the jurisdictional hearing. Furthermore, the evidence showed Parents did *not* fail to make provision for Minor at the time of their arrest, because they summoned Grandmother to take care of him. She arrived at the scene in a timely fashion prepared to take Minor into her care. The Agency asserts Grandmother was not an adequate caretaker because she had a criminal history, but they provide no record citation to that effect. The Agency's jurisdiction report states only that Minor could not "immediately" be placed with Mother's parents because they "failed to pass the CLETS process." In any event, that Grandmother did not "immediately" qualify for official placement is not evidence she was unable to care for Minor while Parents secured their release from custody, much less evidence that leaving the Minor in her care presented a substantial risk of serious physical harm to him. (See *Maggie S. v. Superior Court* (2013) 220 Cal.App.4th 662, 673 [no evidence that caretaker with revoked foster care license presented risk of harm].) The Agency cites to no evidence Grandmother was unable to care for Minor; the video taken by the officers at the scene shows Grandmother caring for Minor and changing his diaper. Finally, because the alleged failure to provide for Minor arose out of Parents' arrest and there is no evidence they failed to provide care for him at

[8] We grant Father's November 3, 2014 request for judicial notice of the September 24, 2014 dismissal of the criminal charges against Parents.

any other time, there was no substantial evidence of any future risk of harm of that sort at the time of the jurisdiction hearing.

B. *Allegation b-2*

Allegation b-2 provides, "The [M]other and [F]ather have engaged in domestic violence while the child was in their presence and, on at least one occasion the [F]ather sustained injuries." The only evidence of domestic violence is Father's former wife's statement to the Agency that she once observed him with a bruise which he attributed to Mother. However, there is no evidence Minor was even alive when Father received that bruise, much less present. (*In re Daisy H.* (2011) 192 Cal.App.4th 713, 717 ["Physical violence between a child's parents may support the exercise of jurisdiction under [section 300(b)] but only if there is evidence that the violence is ongoing or likely to continue and that it directly harmed the child physically or placed the child at risk of physical harm."].) Neither does the record show the January 2014 incident involved domestic violence. The evidence is that Mother was in the bathroom yelling and Father was trying to persuade her to come out.[9] Even if heated arguments could be considered "domestic violence," the Agency cites no evidence any such arguments presented a substantial risk of serious physical harm to Minor.[10]

C. *Allegation b-3*

Allegation b-3 provides, "Napa Police Department found the [Minor] to be left in a car unsupervised while the [P]arents were inside their residence." The police officers, Agency, and juvenile court were appropriately concerned about that circumstance.

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[9] The Agency asserts without any citation to the record that "[t]he police reported that parents were engaged in domestic violence." The officers' testimony did not include any observations of domestic violence.

[10] The Petition also related that Father's former wife reported to the Agency that "her children had recently not wanted to go to [F]ather's house due to all of the arguing and fighting going on between him and [Mother]." There is no indication the fighting was physical, and that statement does not constitute evidence of a substantial risk of serious physical harm to Minor.

However, there is no evidence Minor was left unsupervised for a substantial amount of time. Parents testified the entire argument lasted 20 minutes, but the argument started before Minor was placed in the car. Father testified Minor had been left alone for less than a minute. Because the police observed Minor to be "content," no inference can be made from his emotional state that he had been left alone for a substantial period of time. The juvenile court admitted it did not know how long Minor had been in the car. Accordingly, any inference that Minor was alone for any significant period of time on January 24, 2014 was speculative. (*In re B.T.*, *supra*, 193 Cal.App.4th at p. 691 [speculative inferences cannot support court's findings].) Nor was there any evidence Minor was likely to be left alone in the car or otherwise inadequately supervised in the future. (See *In re J.N.* (2010) 181 Cal.App.4th 1010, 1025; *In re S.O.* (2002) 103 Cal.App.4th 453, 461.)[11]

D. *Allegation b-4*

Allegation b-4 provided, "Napa Police Department found the [Parents'] home to contain remnants of marijuana, hash oil, and drug [paraphernalia] which were all accessible to the 11-month-old [Minor]." Without question it is concerning that Parents had marijuana on open surfaces in the living room, and the Agency was fully justified in investigating the matter further. Nevertheless, in order to sustain a jurisdictional finding under section 300(b), the Agency was required to demonstrate the requisite risk of harm: "Subdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300[(b)], there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness." (*In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 823.)

[11] The Agency suggests the fact that charges were filed against Parents constitutes evidence supporting the allegation. However, the Agency was required to present evidence of the requisite risk of harm at the time of the jurisdiction hearing; an out-of-court charging decision based on different criteria is not an adequate substitute. In any event, the criminal charges against Parents were dismissed.

The evidence in the record shows marijuana products and paraphernalia were on top of a computer desk in the living room. Minor could not walk unassisted, but the social worker testified Minor could touch the top of the desk if he was reaching, and a photo in evidence shows Minor being supported upright and a little shorter than the desk. Thus, there is support for a finding Minor could physically reach some items on the desk.[12] The Agency does not, however, cite to any evidence from which the juvenile court could have inferred that Minor was permitted to crawl around unsupervised while there was marijuana on open surfaces in the living room. The social worker testified Parents demonstrated "proper parenting behavior" from her observations, and there were no reports of Minor being unattended, other than the incident when he was left strapped in his car seat.

Moreover, and most fundamentally, there is no evidence from which the juvenile court could find there was a likelihood the conditions on January 24, 2014 would be repeated. Evidence in the record established that the condition of the house on that date was unusual and caused by the trauma of Mother's recent sexual assault. Parents readily agreed to a comprehensive safety plan proposed by the Agency. Parents testified they had purchased a lockbox and would in the future keep all marijuana locked within. The social worker testified Parents told her the same and showed her the locked cabinet. Because the allegation that Parents had a substance abuse problem was dismissed, there was no basis for the juvenile court to conclude Parents would be unable to control where they kept their marijuana in the future. The Agency points to no evidence to the contrary.

[12] It is unclear what particular items Minor could have accessed and ingested. For example, the marijuana packets were "hermetically sealed," and the hash oil was on top of a box higher than the surface of the desk and may have been in a closed container. It is also unclear whether the ingestion of the burnt remains of a joint or CBD oil would pose a risk of serious physical harm; the Agency's expert's testimony did not specifically address those points. However, as explained in the text, assuming the evidence showed Minor could have accessed materials that were seriously dangerous to him, there was still insufficient evidence of the requisite risk of harm at the time of the jurisdictional hearing.

As we noted earlier, " '[P]revious acts of neglect, standing alone, do not establish a substantial risk of harm; there must be some reason beyond mere speculation to believe they will reoccur.' " (*In re Ricardo L.*, *supra*, 109 Cal.App.4th at p. 565; see also *In re J.N.*, *supra*, 181 Cal.App.4th at p. 1025; *In re S.O.*, *supra*, 103 Cal.App.4th at p. 461.)

In re J.N., *supra*, 181 Cal.App.4th 1010, is instructive. That case involved a very dangerous act of neglect, as the father was involved in an automobile accident with his three children in the car, while he was driving severely under the influence of alcohol; the mother was also in the car and intoxicated; and two of the children were injured. (*Id.* at pp. 1015–1016.) The court of appeal described the facts as "egregious" and summarized, "[t]here were serious lapses in the judgment of both parents, who drank alcohol to excess while their three young children were in their care and then, despite their pronounced alcohol impairment, proceeded to have father attempt to drive the family home." (*Id.* at p. 1025.) Nevertheless, the court reasoned there was insufficient evidence "from which to infer there is a substantial risk [the parents' endangering] behavior will recur." (*Id.* at p. 1026.) The court emphasized the juvenile court did not find the parents were substance abusers; "there was no evidence, and there were no factual allegations, that either parent's parenting skills, general judgment, or understanding of the risks of inappropriate alcohol use is so materially deficient that the parent is unable 'to adequately supervise or protect' the children;" "[t]he evidence consistently indicated that the children were healthy, well adjusted, well cared for, bonded with each other, and developing appropriately;" and "both parents were remorseful, loving, and indicated that they were willing to learn from their mistakes." (*Id.* at p. 1026.) Equivalent circumstances are present in the current case. The Agency has not cited evidence to the contrary, or demonstrated other reasons why there was a substantial risk the conditions

present in January 2014 would recur.[13] The juvenile court identified no such reasons in sustaining the Agency's petition.

E. *Allegation b-5*

Allegation b-5 provided, "Upon arriving at the [Parents'] home Napa Police Department found the home to contain a very strong odor which they identified as marijuana." The bare fact that Parents' home smelled of marijuana is not substantial evidence of a substantial risk of serious physical harm to Minor. The Agency provides no argument and cites no evidence to the contrary. Moreover, the social worker testified there was no marijuana odor during her subsequent visits to the home in February 2014. Parents agreed not to smoke marijuana indoors, and the Agency cites no evidence to support a conclusion the conditions of January 24, 2014 were likely to recur. (*In re J.N.*, *supra,* 181 Cal.App.4th at p. 1025; *In re S.O.*, *supra,* 103 Cal.App.4th at p. 461.)

F. *Allegation b-6*

Allegation b-6 provided, "The [P]arents have smoked while in the presence of 11-month-old [Minor] and [have] exposed him to second hand smoke which places him at risk [of] severe respiratory diseases and hinders the growth of his lungs." The Agency cites to no evidence Parents smoked marijuana while Minor was present in the same room and exposed to second hand smoke.[14] (Cf. *In re Lana S.* (2012) 207 Cal.App.4th

[13] The Agency asserts *In re J.N.* is distinguishable because Parents "seemed not to appreciate what they had done." However, the Agency fails to cite any evidence to support that assertion. To the contrary, the evidence shows that Parents agreed to appropriate steps to make the home healthier for Minor, and did in fact make the home more appropriate. On February 5, 2014, Parents signed the safety plan requested by the Agency; the Agency cites no evidence Parents failed to follow that plan. The Agency asserts that, *subsequent to the juvenile court's jurisdictional findings*, Parents refused to cooperate with the Agency in various respects. The cited portion of the Agency's dispositional report does not fully support the Agency's assertions. In any event, any lack of cooperation by Parents subsequent to the jurisdictional hearing cannot provide the evidence to support the juvenile court's findings at the time of the hearing.

[14] The Agency asserts Parents admitted smoking marijuana "while in the presence of" Minor, but the cited portion of an Agency report contains no such admission.

94, 105 [court could conclude a parent used drugs in front of minors where minors tested positively for methamphetamines].) Parents agreed in their safety plan not to smoke marijuana indoors, and the Agency points to no evidence Parents were unwilling or unable to follow that plan. Because the juvenile court dismissed the allegation that Parents had a substance abuse problem, there was no basis to conclude Parents are unable to control when and where they consume marijuana.

Furthermore, although the Agency social worker and expert testified that exposure to marijuana smoke is concerning, the Agency cites no evidence or authority that exposure to such secondhand smoke can in itself establish the requisite risk of harm for jurisdiction under section 300(b). (*In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003 ["the DCFS had to present evidence of a specific, nonspeculative and substantial risk to [the minor] of serious physical harm"]; *In re S.O.*, *supra*, 103 Cal.App.4th at p. 461 ["The [Department] 'has the burden of showing specifically how [the Minor has] been or will be harmed.' "].) As *In re Destiny S.* pointed out in rejecting a claim of section 300(b) jurisdiction based on the risks of secondhand marijuana smoke, "the logical consequence of the department's argument would be to remove minor children from the homes of all smokers in Los Angeles County—regardless of what they smoke. We know of no legal support for this proposition." (*In re Destiny S.*, at p. 1004.)

G. *Allegation b-7*

Allegation b-7 provided, "The home was found to be unkempt in that there were miscellaneous items found on the floors and table which could have posed a safety risk to the 11-month-old." The extremely messy condition of Parents' home is not evidence of a substantial risk of serious physical harm to Minor. The social worker testified both Parents are employed and she admitted there is no evidence Parents are "unable to provide regular care for [the Minor] due to substance abuse." The house had adequate food, water, heat, and electricity. Minor was clean and healthy. "The absence of ill

effects is a way of distinguishing a loving-but-dirty-home case from a case of real neglect." (*In re Paul E.* (1995) 39 Cal.App.4th 996, 1005, fn. 8; see also *id.* at p. 1005.)

Moreover, there is insufficient evidence the conditions of January 24, 2014 were likely to recur. Evidence in the record established that the condition of the house on that date was unusual—Parents explained to the Agency and testified that Mother had been sexually assaulted a few days before, and Grandmother told the Agency she had never seen the house in that state. Although the juvenile court was not obligated to credit that evidence, there is no evidence to the contrary and the Agency does not argue Parents' explanation is untrue. The social worker testified the condition of the home was "appropriate" when she visited on February 4 and two subsequent visits before the jurisdictional hearing.

Finally, the Agency points to no evidence of "miscellaneous items" allegedly dangerous to Minor. No such hazards are apparent on the video.[15] (See *In re S.O.*, *supra*, 103 Cal.App.4th at p. 461 [Department must show specific risk of harm]; see also *In re James R.* (2009) 176 Cal.App.4th 129, 137 ["Perceptions of risk, rather than actual evidence of risk, do not suffice as substantial evidence."].)

H. *Allegation b-8*

Allegation b-8 provided, "The [M]other disclosed that she is breastfeeding [Minor] although she is smoking marijuana. The mother has intentionally passed the active chemical in marijuana to [Minor] through her breast milk." The parties' experts expressed differing opinions on the health risks to infants whose mothers nursed them on days the mothers consumed marijuana. Assuming there is sufficient evidence of the requisite risk of harm from such conduct, there is insufficient evidence such conduct

[15] The Agency asserts, "The home was found to be unkempt to the degree that it posed a safety risk to [Minor] as detailed by the police." But the cited police report expresses no specific safety concerns relating to the messiness of the home, other than the presence of marijuana.

would recur in the present case. At the jurisdictional hearing Mother testified that, due to removal of Minor from her care, she stopped lactating and could no longer breastfeed Minor. She had no intention of attempting to recommence nursing, and she did not think she would be able to even if she did attempt to do so. The record also shows she told the Agency she previously believed the chemicals in marijuana would not pass to Minor through breastfeeding, and she agreed in the safety plan not to nurse Minor while she was using marijuana. The Agency does not suggest there is any risk Mother will breastfeed Minor in the future, much less while using marijuana.

III. *Conclusion*

As explained above, none of the Agency's bases for jurisdiction under section 300(b) were supported by substantial evidence at the time of the jurisdiction hearing. Our decision should not be read to condone Parents' behavior on January 24, 2014—the condition of the home and the location of Minor certainly supported scrutiny of Parents by the Agency. However, in light of the lack of harm to Minor; Parents' immediate agreement to an adequate safety plan; and the absence of evidence the circumstances of January 24 were likely to recur, it was error for the juvenile court to assume jurisdiction over Minor under section 300(b).

DISPOSITION

The juvenile court's jurisdictional and dispositional orders are reversed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.